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No.

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IN THE

Supreme Court of the United States

October Term, 1984

IN THE MATTER OF THE APPLICATION

OF

JOSEPH BALTER, Assistant Public Defender of Monroe County,

Petitioner,

against

JOHN M. REGAN, as Judge of the City Court of Rochester, New York,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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Dated: September 25, 1984

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Question Presented.

Whether the court properly punished as contemptuous petitioner's wilful disobedience to an order directing him, as an Assistant Public Defender, to proceed to trial where a witness scheduled to testify against his client was represented by another Assistant Public Defender in an unrelated matter?

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BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

By order dated June 3, 1983, this proceeding to review a contempt order was transferred from New York State Supreme Court, Monroe County to the Appellate Division, Fourth Department for initial disposition pursuant

to New York Civil Practice Law and Rules ("CPLR") 7804(g).

The Appellate Division, in a memorandum decision dated November 4, 1983, dismissed petitioner's application and found that the contempt order had been properly imposed. The court's opinion is reported at 97 AD2d 953 and is reproduced in the Petitioner's Appendix at page A6.

The New York State Court of Appeals affirmed the decision of the lower court by decision dated July 3, 1984. The decision is reproduced in the Petitioner's Appendix at A2-A5. The decision has not yet been published.

Jurisdiction.

Petitioner does not cite to any jurisdictional provisions for this proceeding in his petition. Respondent assumes that 28 USC § 1257(3) is the intended jurisdictional basis.

Constitutional and Statutory Provisions Involved.

United States Constitution, Sixth Amendment provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

New York State Judiciary Law, § 750, provides to courts the power to punish for criminal contempt. It states in relevant part:

> "A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:
> "Wilful disobedience is its lawful mandate."

Counterstatement of Facts.

This is a proceeding brought to review an order which held petitioner, an Assistant Public Defender, in contempt of court. The events involved in this proceeding arose in a criminal action in Rochester City Court (R52).* Respondent, a City Court Judge, was presiding on June 24, 1982 in an action which charged Raymond Lennon, with falsely reporting an accident, leaving the scene, and driving while his license was revoked. Mr. Lennon was represented by the petitioner, Joseph Balter of the Public Defender's Office. During the jury selection process, the Assistant District Attorney stated that he would call Christopher Pellitera as a witness in the trial (R14). The *voir dire* was completed prior to lunch, and the court recessed until 1:50 p.m. (*id.*).

When court recommenced, both prosecution and defense attorneys informed the court that the intended witness had been arrested previously and arraigned on burglary and larceny charges. It also was disclosed that he was represented by the Public Defender's Office. It was not yet known at that time that Mr. Pellitera had already pled guilty to reduced charges (R16).

Based on petitioner's brief that an "inherent conflict" existed with regard to his office's representation of both Mr. Lennon and Mr. Pellitera, petitioner requested that his office be relieved of its responsibility to represent Mr. Pellitera, the primary witness against Mr. Lennon (R53). While petitioner stated that he was "not privy to any information [regarding the Pellitera matter] which was communicated to Mr. Zambito" (R55), the Assistant Public Defender assigned to that matter, he felt that he could not

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*References are to the Record on Appeal.

properly represent Mr. Lennon. Petitioner further requested that substitute counsel be assigned to represent Mr. Pellitera, and that they "have a full opportunity to consult * * * prior to proceeding" (R57).

Respondent, after being satisfied by petitioner that he was not privy to any information concerning the Pellitera action which he could use in cross-examination (R60), requested petitioner to inform his office that the court suggested that the Public Defender's office withdraw from its representation of Mr. Pellitera (*id.*). Withdrawing from the witness' case would cure any conflict which might have existed and, indeed, it was the relief sought by petitioner himself. The respondent further ordered both counsel to refrain from examination of the witness, Pellitera, with respect to the unrelated matter pending against him (R60-63).

Petitioner was unwilling to go before the judge in the Pellitera case for a change of counsel, and further refused to proceed with the trial until Judge Regan made certain that Mr. Pellitera had been assigned counsel and had an opportunity for consultation (R66). Petitioner then stated that "if it's necessary for the Court to hold me in contempt, be that the case, but I am not going to go on with this case" (R67). Petitioner then continued:

> "Your honor, there is no reason to go further with this case. I'm informing the Court right now that until Mr. Pellitaire [*sic*] does have assigned counsel and consults with that assigned counsel, I'm not going forward with the trial of this case." (*Id.*)

The respondent noted that petitioner's request to have substitute counsel appointed for Mr. Pellitera should be

brought before the presiding judge in that action since respondent was in no position to substitute defense attorneys in an action over which he was not presiding. Respondent also informed petitioner that his objection had been noted in the record and that if petitioner did not proceed, he would indeed be held in contempt of court (R72-73).

In response to petitioner's apprehension that the witness would face self-incrimination problems with respect to his testimony in the Lennon case, the court assured him that he would forbid examination on any charges or matters involved in the pending case (R74).

Petitioner stood fast on his refusal to proceed (R75), and respondent's statement that he would have to grant a mistrial if petitioner did not proceed did not alter petitioner's stance (R75-76). Nor did petitioner change his position in light of his acknowledgement that appellate remedies were available (R78).

Respondent then found petitioner in contempt of court, as defined by section 750, subdivisions 3 and 4, of the Judiciary Law (R80, 82).* A mistrial in the Lennon case was ordered (R83, 88, ¶17).

The written order of contempt imposed a fine of $250.00 on petitioner, to be paid from personal, and not public funds and a conditional discharge of one year, on the condition that petitioner "not give any other tribunal probable cause to cite him for contempt" (R26). This Article 78 proceeding to review the court's ruling was then initiated.

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*The written mandate apparently only punished for contempt under subdivision 3 (R13-26).

Reasons for Denying the Writ.

The petition for a writ of certiorari should be denied because there are no special or important reasons to justify review by this Court.

Petitioner's characterization of this case as one invoking significant constitutional issues is based on an extremely indulgent reading of this Court's holdings in cases involving contempt of court. The underlying rule that may be culled from the precedent of this Court is that disobedience to a court's order is properly punished as contemptuous unless the disobedience to the court's order was the only available manner by which constitutional protections could be safeguarded. Compare *United States v. United Mine Workers,* 330 US 258, 294 (1947); *Johnson v. Virginia,* 373 US 61 (1963). That is not this case.

There was no need for petitioner to disobey the court's order that he proceed to trial in order to protect the rights of the criminal defendant or the witness against him. Petitioner could have, simply enough, heeded the suggestion made by the court that he have his office seek to withdraw from its representation of the witness (R60, 72). No such effort was made. By so withdrawing, petitioner would have avoided what he has termed an "irreconcilable" conflict. Petitioner had already assured the court that he knew nothing about Pellitera, the witness. No confidences would have been betrayed by petitioner, and there would have been no questions regarding the propriety of cross-examination of Pellitera.

Even if petitioner or his office had not gone before the judge in the *Pellitera* case to seek withdrawal of his office and had instead gone forward to trial, there was no possible constitutional injury threatened that could not have

been remedied on appeal. It is only in the exceptional case—where appellate remedies would not cure the injury—where this Court has held that disobedience should not have been punished. *Maness v. Myers,* 419 US 449 (1975). As noted by the New York Court of Appeals, both the defendant and the witness had available appellate remedies were they to have been convicted; they might have argued there had either been a denial of the right of effective representation, or the defendant's right to a thorough cross-examination of the witness, or the witness' privilege not be be compelled to give testimony later used against him at his criminal trial.

An appellate remedy was available to the defendant if he felt that his right to the effective assistance of counsel had been compromised by the fact that his lawyer's office represented an adverse witness. *Holloway v. Arkansas,* 435 US 475 (1978).

As to the witness, there was absolutely no injury to him which could have specifically been caused by the petitioner's cross-examination of him. No confidential information could have been revealed because, by petitioner's own assertion, he was not privy to any such information. Petitioner's cross-examination would not have been any different had the witness been represented in his criminal trial by another Assistant Public Defender or by a lawyer in private practice.

Emphasis has been given by this Court to the importance of obedience to a court's order, even where counsel feels that the judge may be committing error. As stated in *Maness v. Myers,* 419 US 449, 459 (1975):

> "[t]he orderly and expeditious administration of justice by the courts requires that 'an order issued

> by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.' *United States v. United Mine Workers,* 330 US 258, 293 (1947). This principle is especially applicable to orders issued during trial."

Simply put, there was no compelling justification here for petitioner's refusal to allow the legal process to run its established course rather than disobey the order of a court. Compare *Maness v. Myers* (disobedience to a court's order was the only means by which information sought by the court could be kept confidential); *Johnson v. Virginia*, 373 US 61 (1963). Unsupported conjecture that the witness would waive his Fifth Amendment privilege does not create such a justification. Indeed, respondent specifically ruled that the witness could not be cross-examined on his then pending criminal charges. Finding the appellate remedies adequate to protect the rights of all parties involved, the court ruled correctly that there was no room for petitioner's refusal to comply with its order.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Dated: Albany, New York
September 25, 1984

Respectfully submitted,

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